IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

LINDA BEARD,

Plaintiff,

v. NO. 1:00CV38-S-A

TREETOP ENTERPRISES, INC.,

Defendant.

OPINION

In this case, plaintiff alleges that she was sexually harassed by her male supervisor and then retaliated against after she complained about his actions. Presently before the court is defendant's motion for summary judgment.

FACTS

The plaintiff, Linda Beard, began working at defendant's Columbus, Mississippi, Waffle House Unit #279 in November, 1995. Several months later, Charles Lowe began serving as the manager. From the time he began at this unit, Lowe constantly made comments and jokes of a sexual nature. Some of these were directed personally at Beard, including the following:

- Look at that butter ball a--.
- I would like to get me some of that.
- What does Linda want with that old man [referring to her husband]?
- Some men have gambling and drinking problems, but women are my weakness.

During this time period, defendant had in place a sexual harassment policy which placed on Beard a duty to report Lowe's actions to either a person in her chain of command or the Waffle House sexual harassment hotline. Beard was fully aware of this requirement.

Beard first complained of Lowe's conduct in November, 1996, approximately one year after it first began. She did not, however, utilize either of the policy steps but instead complained to Mike Guyton, who at the time was a manager trainer and therefore not one of Lowe's superiors. In turn, Guyton advised Ken Wright, who was the district manager and Lowe's immediate supervisor, of the problem but apparently to no avail. According to Beard, she did not want to go to Wright herself because he and Lowe were friends. She acknowledged, however, that she could have gone directly to any of Lowe's superiors within the company without following the chain of command. Two months later, during the course of a friendly conversation between Beard and Pam Riddle, a Waffle House manager in Alabama, the subject of Charles Lowe was discussed. Riddle then called Jim Hutto, defendant's director of operations, and Hutto contacted Beard, who "proceeded to tell him...how Charles was harassing me and everybody else that worked there." This was the first time Beard personally had any contact with one of Lowe's superiors. Though she acknowledged that she knew Hutto "don't put up with mess like that" and that once reported, he would make an investigation and attempt to prevent future harassment, she did not call him when Lowe first started the harassment because she "just kind of tried to blow it off." Indeed, she admitted that Lowe's comments did not affect her work performance though she "did dread going to work every day."

On January 8, 1997, Hutto and Jay Ezell, the area manager, went to Columbus to investigate Beard's complaints. The employees interviewed by the men gave conflicting statements about Lowe's behavior. Hutto and Ezell then counseled Lowe about defendant's sexual harassment policy,

informed him that the complained of behavior would not be tolerated, and advised him that similar behavior in the future would lead to his termination. Hutto and Ezell also ordered Lowe not to take any retaliatory action against Beard. Beard was satisfied with defendant's actions and had no complaints about the way the company handled the investigation. The evidence is conflicting as to whether the harassment continued after the reprimand. Beard variously testified as follows:

> Q. Did the harassment stop after he was counseled?
>
> A. No. It got worse.
>
> * * *
>
> [H]e thought it was funny that he got reprimanded....
>
> Q. You didn't complain again though, did you?
>
> A. To my lawyer.
>
> Q. But you never complained to Treetop prior to talking to your lawyer?
>
> A. Nope.

Seven pages later in the deposition, she stated:

> Q. Now, Charles Lowe didn't make any sexual comments after your complaint, did he?
> A. I don't remember.
>
> Q. [T]o the best of your knowledge, you don't remember him making any more sexual comments after you complained to Jim Hutto?
>
> A. I can't say that he didn't.
>
> Q. But you don't remember any specifically?
>
> A. No.

On January 10, 1997, two days after Hutto and Ezell counseled Lowe, Mike Guyton, who

by this time was the district relief manager for Unit #279, quit. According to defendant, Ezell and Wright made the decision to fill the position with John Pantaleo, a manager trainee in Tupelo, Mississippi. Because Pantaleo's training would take approximately six to eight weeks, Ezell and Wright decided they would need a temporary in-unit relief manager for Unit #279. Towards that end, they made the decision to place Doris Martin, a second shift grill operator, in the position as in-unit relief manager until Pantaleo's training was completed. To train Martin, it was necessary to move her from second shift to first shift. This in turn necessitated changing Beard, who was the only first shift grill operator, from first shift to second shift to fill the grill operator vacancy left by Martin. Beard maintains that Lowe made the decision to change her shift, and that she was returned to first shift two weeks later only after Ezell directed Lowe to make the change. Without dispute, Martin was not given a pay increase to serve as in-unit relief manager, and neither Beard's pay, weekly hours, benefits, nor job responsibilities were affected by the temporary move. However, according to Beard, being an in-unit relief manager was a in essence a first step towards being considered for management training. Beard maintains that before she complaint about Lowe's conduct, Wright had promised her the in-unit relief manager position and that she was qualified for that position, having previously been trained for the position by Lowe.

Five days after the shift change, Beard filed a charge of discrimination with the EEOC. It is undisputed that the decisions to use Martin as the in-unit relief manager and to change Beard's schedule temporarily were all made before Beard filed her charge of discrimination with the EEOC, and that no one in defendant's organization knew beforehand that Beard intended to file an EEOC charge.

DISCUSSION

To prevail on a hostile work environment claim, plaintiff must prove, among other things, that the alleged unwelcome sexual harassment affected a term, condition, or privilege of her employment. *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606 (5th Cir. 1998). The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986). The following are not sufficient to support a case of hostile work environment: (1) mere utterance of an epithet which engenders offensive feelings in an employee, (2) simple teasing, (3) offhand comments, and (4) isolated incidents, unless extremely serious. *Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871, 873 (5th Cir. 1999). As stated in *Shepherd*,

> Whether an environment is "hostile" or "abusive" is determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so.

Id. at 874 (citations omitted). The salient question is whether Lowe's comments, "although offensive, are [] the type of extreme conduct that would prevent [plaintiff] from succeeding in the workplace." The answer must be in the negative. Indeed, Beard herself admitted that Lowe's comments did not affect her job performance in any way. In this court's view, no reasonable jury could find that these comments were sufficiently offensive so as to create an abusive working environment, especially in light of the fact that Beard made no complaint about them until a year after they began. Defendant's motion for summary judgment on the hostile environment claim is therefore granted.

The court reaches a contrary conclusion, however, on the retaliation claim. Taking the evidence in the light most favorable to plaintiff and without weighing the evidence or making any credibility determinations, the court believes that the better course would be to deny summary judgment and "to proceed to a full trial," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), on this issue.

An appropriate order shall issue.

This _____ day of February, 2001.

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SENIOR JUDGE